

No. 1-12-2422

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 16102
	)	
TORRIAN TURNER,	)	Honorable
	)	Rickey Jones,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE LAMPKIN delivered the judgment of the court.  
Presiding Justice Rochford and Justice Reyes concurred in the judgment.

**O R D E R**

¶ 1 *Held:* The trial court erred in summarily dismissing defendant's *pro se* postconviction petition at the first stage of postconviction proceedings where the defendant's claim, that his trial counsel coerced him into waiving his right to a jury, contained an arguable basis both in law and in fact.

¶ 2 Following a bench trial, defendant Torrian Turner was convicted of two counts of attempted first degree murder pursuant to section 8-4(a) of the Criminal Code of 1961 (the Code) (720 ILCS 5/8-4(a), 9-1(a) (West 2008)), and the trial court sentenced him to two consecutive

terms of 32 years in prison. On direct appeal, this court entered a dispositional order directing the clerk to make several corrections to defendant's mittimus and fines and fees order. Defendant subsequently sought relief *pro se* under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 (West 2008)), alleging, *inter alia*, ineffective assistance of trial and appellate counsel. The trial court summarily dismissed his petition. Defendant appeals, contending the trial court erred in summarily dismissing his petition because he would not have waived his right to a jury trial absent trial counsel's professionally unreasonable representation. We reverse and remand for further proceedings.

¶ 3 At trial, the State presented the testimony of the shooting victims, Solomon Johnson and Shawn Holston. At the time of the offense, they lived in a building next door to defendant's apartment building. On August 15, 2009, around 10 p.m., defendant was sitting outside his apartment building at 8234 South Maryland Avenue. Solomon, Holston, Anthony Johnson, and Cedrick Johnson approached defendant and told him to stop selling drugs in the neighborhood. Defendant did not respond, and the men returned to their apartment. About 20 minutes later, Solomon and Holston began walking toward 83rd Street when they observed defendant emerge from a gangway. Defendant shot Solomon several times and then shot Holston four times. While in the hospital on August 17, 2009, both Solomon and Holston identified defendant from a photo array as the shooter. Defendant was arrested on August 24, 2009.

¶ 4 Anthony Johnson testified that after he and the others confronted defendant on the night of the offense about selling drugs, Anthony went home and gathered trash to take to the outside dumpster. While he was taking the trash out, Anthony saw Solomon and Holston walking on Maryland Avenue toward 83rd Street. Anthony then observed defendant walk southbound in an

alley with a gun in his waistband. Anthony followed defendant but lost sight of him when defendant cut through a gangway. As Anthony neared the gangway, he saw defendant point a gun north toward 82nd Street. Anthony saw fire coming from defendant's hand and heard multiple gunshots. When Anthony came around to the front of the house, he saw both Solomon and Holston on the ground, bleeding. After police arrived, Anthony told a detective that he observed defendant shoot at Solomon and Holston. Anthony later identified defendant as the shooter from a photo array and then a physical lineup.

¶ 5 The defense presented the testimony of Stanley Montgomery and Rosalee Montgomery, who lived in defendant's building at 8234 South Maryland Avenue. Stanley testified that he was with defendant when four men came to his porch to talk to defendant. The men had a conversation, but defendant never said anything and the men left. After the men left, defendant got up and went to his yard. Stanley's mom, Rosalee, came home and she briefly spoke with Stanley and defendant, and then went upstairs. While Stanley and defendant were conversing from their respective yards, Stanley heard gunshots coming from 83rd Street. He was unable to see the shooter. When the police arrived, Stanley told investigators he did not want to give a statement.

¶ 6 Rosalee Montgomery testified that when she arrived home she saw both her son and defendant outside, standing in their respective yards. She had a brief conversation with them and then went up to her apartment. When she got to the second floor, she heard gunshots, went to the window, opened it, and told her son to "come to the house." She also declined to give investigators a statement.

¶7 Defendant also testified, and his testimony was consistent with the testimony of Stanley and Rosalee Montgomery.

¶ 8 The trial court found the State's witnesses credible and the defense witnesses not credible. The trial court found defendant guilty of two counts of attempted first-degree murder, and sentenced him to two consecutive sentences of 32 years.

¶ 9 On direct appeal, defendant and the State moved for a summary disposition, which this court granted. We ordered the clerk of the court to correct defendant's mittimus to reflect the proper sentence, the proper presentence custody, and the correct amount of fees owed by defendant. *People v. Turner*, No. 1-10-3691 (2011) (dispositional order). On March 23, 2012, petitioner filed a "Motion for Ineffective Assistance of Appellate Counsel." In the motion, defendant argued that his appellate attorney was ineffective for agreeing to a motion for summary disposition. The trial court denied the motion on May 7, 2012.

¶ 10 On June 6, 2012, defendant filed a postconviction petition. He alleged that (1) he received ineffective assistance from trial and appellate counsel; (2) the prosecution engaged in misconduct; (3) his conviction was obtained by perjured testimony and false or erroneous identification of defendant by incredible witnesses; (4) the evidence was not sufficient to convict him beyond a reasonable doubt; (5) he did not receive a fair trial; (6) the trial court improperly restricted his right to cross-examine witnesses; and (7) the lineup procedure was improper. Regarding his ineffective assistance of trial counsel allegation, defendant alleged that he was coerced into waiving his right to a jury trial because trial counsel told defendant that he had not paid counsel enough money for a jury trial and that the only way counsel would handle defendant's trial was if defendant took a bench trial because it would be easier for both parties.

Defendant further alleged that he did not know counsel was not entitled to decide what kind of trial defendant would have and he would have taken the jury trial that had already been set if he had known that he was entitled to have the final say on the jury or bench trial issue. The trial court summarily dismissed the defendant's petition finding it "frivolous and patently without merit."

¶ 11 On appeal, defendant contends that his postconviction petition should not have been dismissed at the first stage of the postconviction process because he presented an arguable claim of ineffective assistance of trial counsel. We agree. Defendant alleged sufficient facts to show that (1) counsel's alleged coercive conduct of requiring more money if defendant insisted on a jury trial was professionally unreasonable and prejudicial to defendant's right to a jury trial; and (2) there was a reasonable likelihood that defendant would not have waived his right to a jury trial in the absence of counsel's unprofessional and prejudicial conduct.

¶ 12 A postconviction petition is a means by which a criminal defendant may obtain redress from a conviction that resulted from a denial of his rights under the federal and state constitutions. *People v. Wrice*, 2012 IL 111860, ¶ 47; *People v. Rissley*, 206 Ill. 2d 403 (2003). The Act provides a three-stage process for adjudication of petitions for postconviction relief. 725 ILCS 5/122-1, *et seq.* (West 2012). The first stage requires the trial court to determine whether the postconviction petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012); *People v. Morris*, 236 Ill. 2d 345, 354 (2010). The first stage presents a pleading question, and the trial court is not to consider the postconviction petition on the merits. *People v. Smith*, 326 Ill. App. 831, 839 (2001). Unless positively rebutted by the record, all well-pled facts are taken as true at this stage. *People v. Coleman*, 183 Ill. 2d 381, 385 (1998).

¶ 13 If the court determines that the petition is frivolous or patently without merit, it dismisses the petition. 725 ILCS 5/122-2.1(a)(2) (West 2012). At the first stage, a defendant need only present a limited amount of detail in the petition. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A *pro se* defendant only has to allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act. See *Id.* A petition lacks an arguable basis in law when it is grounded in "an indisputably meritless legal theory," for example, a legal theory which is completely contradicted by the record. *Id.* at 16. A petition lacks an arguable basis in fact when it is based on a "fanciful factual allegation," which includes allegations that are "fantastic or delusional" or belied by the record. *Id.* at 16-17. We review the trial court's summary dismissal of a postconviction petition at the first stage *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 14 Defendant argues that trial counsel's unprofessional conduct coerced his waiver of his right to a jury trial. Defendant alleges that counsel unethically accepted defendant's case without fully disclosing that counsel would require more money if defendant elected to have a jury trial. Accordingly, defendant contends his jury waiver was involuntary because he was forced to accept counsel's representation at a bench trial when counsel's belated demand for more money left defendant with insufficient funds to hire another attorney willing to respect defendant's wish for a jury trial. *Strickland v. Washington*, 466 U.S. 668 (1984), set forth a two-prong test to determine whether a defendant has been denied effective assistance of counsel. Under the first prong of the *Strickland* test, we ask whether trial counsel's conduct fell below an objective standard of reasonableness. *Id.* at 688. Under the second prong, we determine whether there exists a reasonable likelihood that defendant would not have waived his right to a jury trial in the

absence of the alleged error. *Smith*, 326 Ill. App. 3d at 847 (citing *People v. Maxwell*, 148 Ill. 2d 116, 142 (1992), which adapted the *Strickland* test to a claim of ineffective assistance involving waiver of a jury for purposes of a capital sentencing hearing). At the first stage of postconviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness, and it is arguable that defendant was prejudiced thereby. *People v. Tate*, 2012 IL 112214, ¶ 19.

¶ 15 The right to a trial by jury is fundamental to the American criminal justice system. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). Both the United States Constitution and the Illinois Constitution provide for jury trials in criminal cases. U.S. const. amends. VI & XIV; Ill. Const. 1970, art. I, §§ 8, 13. Section 103–6 of the Code of Criminal Procedure provides that every person accused of a crime has the right to a jury trial unless that right is “understandingly waived by the defendant in open court.” 725 ILCS 5/103–6 (West 1998). The determination of whether this right has been validly waived does not rest on any precise formula, but rather turns on the facts of each particular case. *People v. Frey*, 103 Ill. 2d 327, 332 (1984). Ultimately, the decision whether to waive a jury trial belongs to the defendant. *People v. Segoviano*, 189 Ill. 2d 228, 240–44 (2000). The Illinois Supreme Court has recognized the duty imposed on the courts “of ensuring that a defendant's waiver of his right to a jury trial be made expressly and understandingly.” *People v. Smith*, 106 Ill. 2d 327, 334 (1985).

¶ 16 In this case, defendant alleges that he was coerced into waiving his right to a jury trial because his trial counsel told him that he had not paid enough money for a jury trial and that a bench trial would be easier for the parties. After reviewing the record and pleadings, we agree

with defendant that his claim of ineffectiveness is not frivolous or patently without merit. See *Hodges*, 234 Ill. 2d at 16-17. We do not find that defendant's claims are fantastic or delusional because there is a possibility that an out-of-court conversation took place during trial and led defendant to believe he had no choice but to waive his right to a jury trial. Moreover, at this stage, we do not determine the veracity of defendant's claim. Because we take all well-pled facts as true at this stage, defendant's claim has an arguable basis in law and fact. His allegations, if true, demonstrate that trial counsel acted in a professionally unreasonable manner when he allegedly coerced defendant into taking a bench trial against his will. See *Smith*, 326 Ill. App. 3d at 848. Therefore, defendant has sufficiently alleged facts to establish deficient performance by trial counsel under the first prong of the *Strickland* test. Under the second prong, we find a reasonable likelihood that defendant would not have waived his right to a jury trial in the absence of the alleged deficient performance and coercive conduct of trial counsel. See *Smith*, 326 Ill. App. 3d at 848. Therefore, defendant has sufficiently alleged facts to demonstrate the prejudice prong of the *Strickland* test. Defendant's allegations of trial counsel's coercive conduct are not positively rebutted by the record and, thus, are neither frivolous nor patently without merit. While we take no position on defendant's ability to prove his ineffective assistance claim, we find his petition should advance to the second stage of the postconviction process.

¶ 17 Although the State argues that the record rebuts defendant's contention, we disagree. Specifically, the State points to (1) defendant's written and in-court jury waiver and (2) counsel's apparent willingness to litigate a jury trial. However, neither of these contentions positively rebuts defendant's allegation that he was coerced into waiving his right to a jury trial.



¶ 18 First, although defendant's in-court statement and written waiver show that he waived his right to a jury trial, they do not show whether his waiver was free of coercion on the part of his counsel. In *Smith*, 326 Ill. App. 3d 831, this court addressed the issue of whether the defendant's in-court jury waiver positively rebutted his postconviction petition claim that the waiver was involuntary. In *Smith*, the defendant alleged that his in-court jury waiver was based on counsel's advice that a bench trial was a better option because the judge "owed him a favor" and would have information not available to the jury. *Id.* at 847. On appeal from the first stage dismissal of defendant's petition, this court found that the defendant's in-court signed jury waiver did not rebut the specific allegation about counsel's out-of-court statement. *Id.* at 848-49. This court concluded that "while we take no position on defendant's ability to prove his ineffective assistance claim, we find his petition should advance to the second stage of the post-conviction process." *Id.* at 849. We find a similar outcome is necessary in this case.

¶ 19 Second, counsel's numerous court appearances and settings of defendant's case for a jury trial show merely that, at some point, counsel had considered litigating a jury trial. However, contrary to the State's contentions, nothing about counsel's court appearances positively rebuts defendant's claim that counsel, at some point prior to trial, refused to participate in a jury trial because defendant did not pay him enough money. Defendant has alleged that, after his case was set for a jury trial, an out-of-court conversation took place that improperly persuaded him to waive his right to a jury trial. This information is not conveyed through counsel's numerous court appearances. Thus, the record does not positively rebut defendant's claim of ineffective assistance of counsel, and defendant's petition should advance to the second stage of the process for further investigation of his claims.

¶ 20 Furthermore, we reject the State's contention that defendant's petition should be dismissed because the petitioner provided "no details regarding the conversation with his attorney." At the first stage of postconviction proceedings, all a defendant is required to present are "enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act." *Hodges*, 234 Ill. 2d at 9. Thus, we conclude that defendant's *pro se* petition should not have been dismissed as frivolous and patently without merit, as it did not lack an arguable basis in law and fact, and defendant's contentions were not positively rebutted by the record. *Coleman*, 183 Ill. 2d 381, 385 (2001). Rather, the petition presented an arguable constitutional claim sufficient to merit second-stage proceedings.

¶ 21 We reverse the judgment of the Circuit Court of Cook County and remand the cause for further proceedings under the Act.

¶ 22 Reversed and remanded.